In The

Supreme Court of the United States

October Term, 1977

No. 78-201

JOHN B. GREENHOLTZ, Individually, and as Chairman, Nebraska Board of Parole; EUGENE E. NEAL, CATHERINE R. DAHLQUIST, MARSHALL M. TATE, and EDWARD M. ROWLEY,

Petitioners,

vs.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, RICHARD C. WALKER, WILLIAM RANDOLPH, RICHARD J. LEARY, ROBERT L. GAMRON, FREDERICK L. GRANT, WAYNE GOHAM and CHARLES LaPLANTE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PAUL L. DOUGLAS
Attorney General of Nebraska

RALPH H. GILLAN
Assistant Attorney General

2115 State Capitol
Lincoln, Nebraska 68509
Tel: (402) 471-2682

Attorneys for Petitioners

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS—Continued

STATUTES CITED

CONSTITUTION CITED

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—o—

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Petitioners, John B. Greenholtz, Eugene E. Neal, Catherine R. Dahlquist, Marshall M. Tate and Edward M. Rowley, pray for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on May 18, 1978.

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OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is reproduced herein as Appendix A. The decision of the district court, which has not been published, is reproduced herein as Appendix B.

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JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1978. A timely petition for a rehearing en banc was denied on June 9, 1978, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

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QUESTIONS PRESENTED

1. Whether the due process clause of the Fourteenth Amendment applies to the granting or denial of discretionary parole by the Nebraska Board of Parole?

2. If the due process clause of the Fourteenth Amendment applies to the granting or denial of discretionary parole, what procedures are constitutionally mandated?

3. Whether the procedures followed by the Nebraska Board of Parole comply with all constitutionally mandated procedures, if any?

STATUTES INVOLVED

The statutes involved are Nebraska Revised Statutes, §§ 83-192, 83-1,111, 83-1,112, 83-1,114, and 83-1,115. These sections are reproduced in full in Appendix C.

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STATEMENT OF THE CASE

This is a class action suit brought by inmates of the Nebraska Penal and Correctional Complex against the members of the Nebraska Board of Parole under the provisions of the Civil Rights Act, 42 U. S. C. § 1983. Various constitutional deprivations were alleged, so the district court appointed different inmates to represent the various classes, and appointed counsel for each class. Eventually the claims made by the different classes were treated as separate suits.

We are here concerned with the class claiming that they were denied procedural due process in the granting or denial of discretionary parole by the Board of Parole. The district court, after an evidentiary hearing, held that procedural due process applied to the parole release procedure, and that the Board of Parole had failed in certain respects to afford the inmates constitutionally required process. The court ordered certain procedures to be followed in the future.

On appeal, the Court of Appeals affirmed in part and reversed in part. It agreed that due process applied, but disagreed as to the exact procedures required. The

Court of Appeals found that the due process clause of the Fourteenth Amendment required that: (1) Every inmate receive a formal hearing upon first becoming eligible for parole, with subsequent hearings to be allowed in the discretion of the board. (2) Each inmate receive a written notice of the date and hour of the hearing reasonably in advance, the notice to contain a list of the factors which may be considered by the board in making its determination. (3) Subject to security considerations, every inmate be allowed to appear in person to present documentary evidence in support of his application. (4) A record of the proceeding which is capable of being reduced to writing be maintained. (5) Within a reasonable time following the hearing, each inmate to whom parole is denied be given a full and fair explanation, in writing, of the essential facts relied upon and the reasons for denial of parole.

In Nebraska paroles are of two kinds, mandatory and discretionary. Mandatory parole is required to be given when the offender has served his maximum sentence less good-time credits. We are not concerned with that type of parole in this action. Discretionary parole may be given when the offender has served his minimum sentence less good-time credits. It is this type of parole which is the subject of this action.

Nebraska Revised Statutes, § 83-192(9) requires the board to review the record of every committed offender at least once each year, whether or not he is eligible for parole. This hearing is called a "parole review hearing," as is the hearing within sixty days before the expiration of the minimum sentence, mandated by

Neb. Rev. Stat. § 83-1,111. Paroles are never granted at parole review hearings.

If, after a parole review hearing, the board believes the inmate should be considered for parole, he is scheduled for a formal parole hearing. He is notified at least thirty days in advance that his parole hearing has been set for a certain month. Notification of the exact time is by posting of such information at the penitentiary. Prior to the hearing the offender must have a parole plan, and may have legal counsel in preparation for the hearing. See Neb. Rev. Stat. § 83-1,112. At the hearing the inmate may have counsel, and may present whatever evidence he wishes. He is not permitted to hear opposing witnesses or see letters opposing his release.

If an inmate is not scheduled for a parole hearing after a parole review hearing, he is notified of the decision by a form, which also informs him of the reasons for denial. If he is denied parole after a parole hearing, he is notified by letter, which contains the reasons for denial, although, as the Court of Appeals noted, in a very few cases between January 1975 and November 1976 the reasons for denial were not contained in the letters. The facts relied upon by the board in reaching its decision are not set forth in the letter.

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ARGUMENT

I.

This case involves a question in which there is a clear conflict among the various circuits.

The conflict among the circuits over the question of whether any constitutionally mandated procedures apply to parole release hearings was concisely summarized by Mr. Justice Stevens in his dissent in *Scott v. Kentucky Parole Board,* 429 U.S. 60, 50 L.Ed. 2d 218, 97 S.Ct. 342 (1976). He listed in footnote 1 cases from the Fifth and Sixth Circuits holding that due process does not apply, and from the Fourth, Second, Seventh, and D.C. Circuits holding that due process applies to the extent that written reasons must be given for denial of parole. He also listed *Burton v. Ciccone,* 484 F. 2d 1322 (8th Cir. 1973), as an implicit holding that due process does not apply. In view of the Eighth Circuit's holding in this case, however, we must conclude that that circuit did not so construe it, or that it has overruled the case *sub silentio.*

This case appears to be the beginning of a third line of cases, since it mandated procedures beyond those specified in the circuits holding due process applies. Previous cases have, in general, limited the required due process to a statement of reasons for denial of parole. We now appear to have a three-way split in the circuits on this issue.

This Court has frequently indicated its desire to resolve the conflict, since it has granted certiorari in a number of cases, only to vacate them as moot or remand them to consider mootness. Since we are here dealing with a class action, which cannot become moot upon the parole of a particular inmate, it would seem that this is an ideal case for the Court to accept to decide this important question.

II.

Procedural due process does not apply to parole release proceedings.

A petition for certiorari is not a proper place for an extensive argument on the merits. We will therefore make only a very sketchy argument herein.

The Court of Appeals relied heavily on *Morrissey v. Brewer,* 408 U.S. 471, 33 L.Ed. 2d 484, 92 S.Ct. 2593 (1972), *Wolff v. McDonnell,* 418 U.S. 539, 41 L.Ed. 2d 935, 94 S.Ct. 2965 (1974), and *Gagnon v. Scarpelli,* 411 U.S. 778, 36 L.Ed. 2d 656, 93 S.Ct. 1756 (1973). We submit that this reliance is misplaced, and that these cases are clearly distinguishable.

The court suggested that we tried to distinguish *Morrissey, Wolff,* and *Gagnon* on the basis of the distinction between loss of a privilege and denial of a privilege. It is true that some of the cases have made that distinction. See, e.g., *Brown v. Lundgren,* 528 F. 2d 1050 (5th Cir. 1976), and *Scarpa v. United States Board of Parole,* 477 F. 2d 278 (5th Cir. 1973), vacated and remanded to consider mootness, 414 U.S. 809, 38 L.Ed. 2d 44, 94 S.Ct. 79, dismissed as moot, 501 F. 2d 992 (1973). We believe that the argument has validity, but it was far from our main argument distinguishing the cases.

We submit that the primary distinction lies in the type of determination that is involved. In *Morrissey* the question to be determined was whether the parolee had violated the conditions of his parole by buying a car under an assumed name, operating it without permission, giving false statements to police, obtaining credit under an assumed name, and failing to report his place of residence to his parole officer. In *Wolff* the question was whether the inmate was guilty of the misconduct charged, which would trigger disciplinary action. In *Gagnon* the question was whether, while on probation, Scarpelli had committed a burglary, and whether his admission of having done so was made under duress and was false.

All of these are clear-cut factual issues, susceptible of proof and factual determination, one way or the other. In *Wolff v. McDonnell, supra,* this Court said:

> "Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed."

Contrast the factual determinations involved in *Morrissey, Wolff,* and *Gagnon* with the matters the Board of Parole is to consider pursuant to Neb. Rev. Stat. § 83-1,114. Under that section, almost all of the criteria for determination of whether the inmate shall be paroled are highly subjective, and not subject to "proof" in the traditional sense. What "proof" would one introduce that a particular inmate's release would or would not depreciate the seriousness of his crime or promote disrespect for law, or have an adverse effect on institutional discipline?

True, past disciplinary actions against him may be a factor in denial of parole. However, pursuant to *Wolff v. McDonnell* he will already have had a due process hearing in that connection, and his misconduct will have been determined and made a matter of record.

In short, to require each inmate who is eligible for parole to have a formal, due process evidentiary hearing, and to require the board to state the facts it relies on will only tend to divert attention from the statutory criteria to superficial matters such as participation in programs at the penitentiary, lack of violations of rules, etc. Furthermore, after such a hearing at which the prisoner presents his favorable evidence and hears no contrary evidence, he will be frustrated and infuriated if he is denied parole.

We believe that the cases of *Meachum v. Fano,* 427 U. S. 215, 49 L. Ed. 2d 471, 96 S. Ct. 2532 (1976), and *Montanye v. Haymes,* 427 U. S. 236, 49 L. Ed. 2d 466, 96 S. Ct. 2543 (1976), fully support our position. In *Meachum v. Fano* this Court held that the due process clause did not entitle a prisoner to a hearing upon a transfer from one prison to another "absent a state law or practice conditioning such transfer on proof of serious misconduct or the occurrence of other events." The Court distinguished *Wolff v. McDonnell* on that basis.

In *Montanye v. Haymes* this Court held that even if a transfer was for disciplinary purposes, procedural due process did not apply absent some right or justifiable expectation that he would not be transferred except for misbehavior or other specified events.

Misbehavior is susceptible of direct proof. Most of the criteria for determination of parole are not. Nowhere in Nebraska law is a prisoner assured that he will be paroled in the absence of misconduct or other specified events. We therefore submit that *Meachum v. Fano* and *Montanye v. Haymes* control, and that procedural due process does not apply.

III.

If procedural due process applies, the practice of the Board of Parole fully complies with all required procedures.

Those cases which have held procedural due process applies have usually limited it to giving the inmate a reason for denial. See *United States ex rel. Richerson v. Wolff,* 525 F. 2d 797 (7th Cir. 1975), cert. denied, 425 U.S. 914, 47 L.Ed. 2d 764, 96 S.Ct. 1511, *Childs v. United States Board of Parole,* 511 F. 2d 1270 (D.C. Cir. 1974), and *United States ex rel. Johnson v. Chairman, New York State Board of Parole,* 500 F. 2d 925 (2d Cir. 1974), vacated as moot sub nom. *Regan v. Johnson,* 419 U.S. 1015, 42 L.Ed. 2d 289, 95 S.Ct. 488. In *Franklin v. Shields,* 569 F. 2d 784 (4th Cir. 1978), cert. denied, April 24, 1978, the original panel had ordered more extensive procedures, but the court sitting en banc reversed the panel and limited the required procedures to a statement of reasons for denial.

The evidence is that after either a parole review hearing or a formal parole hearing the inmate is given written notice of reasons for denial. (There was evidence that in a period of almost two years, the letters

to eight of the inmates did not contain reasons. One of the eight inmates was not eligible because of loss of good time credits, one said at the hearing that he did not want a parole, and one did not attend the hearing, but sent a note waiving the hearing. A board member testified that failure to state reasons was a departure from the board's practice.) Furthermore, every inmate, whether or not eligible, is interviewed by the board at least once a year, and is also interviewed within sixty days before he becomes eligible. We submit that this more than complies with any required procedures.

It would be wasteful and burdensome to give every eligible inmate a formal parole hearing as soon as he becomes eligible for parole. Many of them, because of criminal records, institutional records, type of crime, or various other factors, have no real chance of early parole. Before a parole hearing, he must have a parole plan. See Neb. Rev. Stat. § 83-1,112. A valid parole plan would contain assurance of employment. Good-faith compliance with the court's order would require the parole counselors to prepare a parole plan, including lining up a job for a man who everybody knows is not going to be paroled.

A statement of the facts relied upon would, in many cases, be very difficult. Often the decision must be made on opinions and feelings of the board members about the inmate's character, the seriousness of his crime, and the chances, in view of the entire picture, that he will successfully complete a parole. To articulate "facts" upon which such decisions are made would be very difficult, particularly since there are five mem-

bers of the board, who might be reaching the same decision for different reasons.

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CONCLUSION

This case presents an opportunity for this Court to resolve a conflict among the circuits. It will not become moot. For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

JOHN B. GREENHOLTZ, Individually, and as Chairman, Nebraska Board of Parole; EUGENE E. NEAL, CATHERINE R. DAHLQUIST, MARSHALL M. TATE, and EDWARD M. ROWLEY, Petitioners

By PAUL L. DOUGLAS
Attorney General of Nebraska

By RALPH H. GILLAN
Assistant Attorney General

2115 State Capitol
Lincoln, Nebraska 68509
Tel: (402) 471-2682

Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Eighth Circuit

No. 77-1889

Inmates of the Nebraska Penal and Correctional Complex, Richard C. Walker, William Randolph, Richard J. Leary, Robert L. Gamron, Frederick L. Grant, Wayne Goham and Charles LaPlante,

Appellees,

vs.

John B. Greenholtz, Individually, and as Chairman, Nebraska Board of Parole; Eugene E. Neal, Catherine R. Dahlquist, Marshall M. Tate, and Edward M. Rowley,

Appellants.

Appeal from the United States District Court for the District of Nebraska

Submitted: February 14, 1978

Filed: May 18, 1978

Before HEANEY and STEPHENSON, Circuit Judges, and BECKER,* District Judge.

STEPHENSON, Circuit Judge.

The defendants-appellants, members of the state of Nebraska Board of Parole (Board), appeal from the decision of the district court[1] in this class action suit

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* The Honorable William H. Becker, Senior United States District Judge for the Western District of Missouri, sitting by designation.

1 The Honorable Albert G. Schatz, United States District Judge for the District of Nebraska.

arising under 42 U. S. C. § 1983. The district court held that the plaintiffs-appellees, inmates of the Nebraska Penal Complex (inmates), had been denied procedural due process by the Board in the Board's consideration of the inmates for suitability for parole.

This case raises the question of whether the due process clause of the Fourteenth Amendment to the United States Constitution extends to parole release determinations, and if so, whether the safeguards currently available under applicable Nebraska law are constitutionally adequate. We affirm that the due process clause applies to parole release proceedings. With respect to the specific procedural safeguards which the district court found were constitutionally required in such proceedings, we affirm in part, reverse in part, and remand.

The Nebraska Board of Parole consists of five members. The chairman and two members are full-time, and the other two members serve on a part-time basis. Neb. Rev. Stat. § 83-191. Under Nebraska law the Board is charged with the responsibility of determining whether and when an inmate should be released on discretionary parole. Neb. Rev. Stat. §§ 83-192, 83-1,114, 83-1,115. The Board is required by statute to review at least once a year the record of each convicted offender, whether or not eligible for parole, and to meet with him and counsel him concerning his progress and prospects for a future parole. Neb. Rev. Stat. § 83-192(9). These parole review hearings last an average of five to ten minutes

and the inmates are not allowed to present evidence or call witnesses in their behalf.

After the annual parole review hearing, each prisoner is sent a form which informs him whether or not he is to receive a formal parole hearing. If he does not receive a formal parole hearing the reasons for deferral at that time are stated and recommendations are made for correcting the deficiencies. Only those inmates who are eligible for discretionary parole are granted a formal parole hearing, but in some instances eligible inmates did not receive a timely formal parole hearing. Between July 1, 1975, and June 30, 1976, 327 formal parole hearings and 1,645 review hearings were held.

If the inmate is given a formal parole hearing, he is permitted to offer evidence in support of parole, and may be represented by retained counsel. He is not permitted to cross-examine or hear opposition witnesses. If he is denied parole after a formal parole hearing, he is so advised in person and by letter. Generally the letter advises him of the reasons for denial, although eight instances were found between January 1975 and November 1976 in which reasons were not contained in the letter.

Inmates are notified either at the time of their original confinement or at subsequent parole review hearings or formal parole hearings of the month during which their next hearing will be held. This general notification occurs from 30 days to 1 year in advance. Notification of the precise date and hour occurs through posting of such information at the penal complex on the date of the hearing.

In its order and memorandum opinion of October 21, 1977, the district court concluded that parole release proceedings must be conducted in accordance with certain due process requirements and that the Board's procedures failed to comply fully with those required procedures. The court further found that the inmates were not entitled to monetary damages, but did allow them to recover their costs, including reasonable attorney fees under 42 U.S.C. §1988.

The initial issue confronting this court is whether parole determination proceedings implicate a liberty interest of the inmates within the meaning of the due process clause of the Fourteenth Amendment. We are convinced that it does.

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Our inquiry of whether the prohibitions of the Fourteenth Amendment apply begins with the Supreme Court case of *Morrissey v. Brewer,* 408 U.S. 471 (1972), where the Court held that the due process clause was applicable to proceedings resulting in revocation of parole. In *Morrissey,* the Court articulated the proper framework for analysis of the question of whether due process applies in a particular situation.

> Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in *Goldberg v. Kelly,* 397 U.S. 254, 263 (1970). The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is

> one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. *Fuentes v. Shevin,* 407 U.S. 67 (1972).

Morrissey v. Brewer, supra, 408 U.S. at 481.

The interest asserted by the inmates in this suit is the present right to be considered for parole in accordance with certain procedural safeguards.[2] Since the state is not required by the Constitution to provide parole for convicted offenders, the inmates' interest is aptly described as a privilege or a matter of grace. However, this distinction is no longer an acceptable basis for determining where the due process clause applies to a governmental action. Chief Justice Burger, speaking for a majority of the Court in *Morrissey v. Brewer, supra,* 408 U.S. at 481, stated: "As Mr. Justice Blackmun has written recently, 'this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege" '. *Graham v. Richardson,* 403 U.S. 365, 374 (1971)."

In the present case the Board attempts to distinguish *Morrissey* as well as *Wolff v. McDonnell,* 418 U.S. 539 (1974) (due process applies to prison disciplinary proceedings where good time credit may be lost), and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973) (due process applies to

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2 Since it is the manner of parole decision-making, not its outcome, that is challenged, the inmates did not present a complaint of the sort in *Preiser v. Rodriguez,* 411 U.S. 475 (1973), for which the inmates' sole federal remedy is a writ of habeas corpus. *See Wolff v. McDonnell,* 418 U.S. 539, 553-55 (1974); *Bradford v. Weinstein,* 519 F. 2d 728, 733-34 (4th Cir. 1974), *vacated as moot,* 423 U.S. 147 (1975).

probation revocation proceeding), on the basis that those cases involved the loss of a privilege and here we are concerned with a denial of a privilege. That is a distinction without a real difference. *Bradford v. Weinstein,* 519 F. 2d 728, 732 and n. 3 (4th Cir. 1974), *vacated as moot,* 423 U. S. 147 (1975).

> [The] present enjoyment of a protectable interest is not a prerequisite of due process. See Goldsmith v. Bd. of Tax Appeals, 270 U. S. 117, 46 S. Ct. 215, 70 L. Ed. 494 (1926) (right of C. P. A. to practice before the Board of Tax Appeals); Willner v. Committee on Character and Fitness, 373 U. S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963), and Schware v. Board of Bar Examiners, 353 U. S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957) (admission to the bar); Speiser v. Randall, 357 U. S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958) (right to a tax exemption).

Bradford v. Weinstein, supra, 519 F. 2d at 732 n. 3. *But see Brown v. Lungren,* 528 F. 2d 1050, 1052-53 (5th Cir.), *cert. denied,* 429 U. S. 825 (1976). While the parole applicant's status is not changed by denial of his application, "in the sense that he remains in the same custodial situation as before, the necessity of due process to support the denial is not therefore obviated, for the status remains the same because of a Board determination which if favorable would have changed the status to one of greater liberty." *Childs v. United States Board of Parole,* 511 F. 2d 1270, 1280 (D. C. Cir. 1974). The nature of the interest at stake in both parole release and parole revocation is the same—conditional liberty versus incarceration—and thus the Fourteenth Amendment applies to both.

The Board also claims that parole release determination should be treated differently than the determinations involved in *Morrissey, Gagnon,* and *Wolff* because in these latter cases the respective boards were required to make factual determinations and therefore hearings were appropriate. However, Neb. Rev. Stat. § 83-1,114 provides that a prisoner eligible for parole is to be released on parole unless he is found to be unfit for one of the reasons listed in the statute. Thus, the Board's decision of whether to grant parole necessitates a factual determination of whether the statutory criteria are present.

The deprivations which result from revocation of a conditional liberty enjoyed by a parolee described in *Morrissey v. Brewer, supra,* 408 U. S. at 481-82, demonstrate the serious effects of denial of parole. Although a parolee is subject to many restrictions not applicable to other citizens, he is able to do a wide range of things available to persons who have never been convicted of a crime. "Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life." *Morrissey v. Brewer, supra,* 408 U. S. at 482.

Since the protection of the due process clause extends to parolees, it may not be denied to inmates. While lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, an iron curtain is not drawn between the prisons of this country and the Constitution. *Wolff v. McDonnell, supra,* 418 U. S. at 555-56. Prisoners may not be deprived of life, liberty, or property without due process of law. *Id.* at 556.

The inmates are not the only ones with an interest in seeing that the parole determination proceedings are

conducted in accordance with the due process clause. The Supreme Court recognized in *Morrissey v Brewer, supra,* 408 U. S. at 484, that society has a stake in the effort to restore the prisoner to a normal and useful life within the law. Thus, society has an interest in not having release on parole denied because of an erroneous determination. Society has a further interest in treating the prisoner with basic fairness. Fair treatment in parole determinations "will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Id.*

Of the six circuit courts of appeals which have decided the issue, four have held that the Fourteenth Amendment does apply to parole determination proceedings. *Franklin v. Shields,* 569 F. 2d 784, 800 (4th Cir. 1978) (en banc); *United States ex rel. Richerson v. Wolff,* 525 F. 2d 797 (7th Cir. 1975), *cert. denied,* 425 U. S. 914 (1976); *Childs v. United States Board of Parole, supra*; *United States ex rel. Johnson v. Chairman, N. Y. State Bd. of Parole,* 500 F. 2d 925 (2d Cir.), *vacated as moot,* 419 U. S. 1015 (1974). *Contra, Scott v. Kentucky Parole Bd.,* No. 74-1899 (6th Cir. Jan. 15, 1975), *vacated and remanded to consider mootness,* 429 U. S. 60 (1976), *on remand sub nom. Bell v. Kentucky Parole Bd.,* 556 F. 2d 805 (1977); *Scarpa v. United States Bd. of Parole,* 477 F. 2d 278 (5th Cir.) (en banc), *vacated and remanded to consider mootness,* 414 U. S. 809, *dismissed as moot,* 501 F. 2d 992 (5th Cir. 1973).

The Supreme Court has not decided the exact question before us of whether a prisoner's interest in prospective parole is an interest to be afforded protection under the due process clause of the Fourteenth Amendment. It

must be acknowledged that there are indications both ways in recent Supreme Court opinions. *See discussion, Williams v. Ward,* 556 F. 2d 1143, 1157-58 (2d Cir. 1977), *cert. dismissed,* — U. S. —.

The Board primarily relies on the companion cases of *Meachum v. Fano,* 427 U. S. 215 (1976), and *Montanye v. Haymes,* 427 U. S. 236 (1976), for its contention that parole determinations do not implicate the Fourteenth Amendment. In *Meachum,* the Supreme Court held that the due process clause did not entitle a prisoner to a hearing when he is transferred from one prison to another, absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other events.

We are not persuaded that the holdings of those cases are applicable to the present case. First, *Meachum* involved a transfer only from one prison to another, albeit with less favorable conditions, while here the Board's determination results in either conditional liberty or incarceration. Second, the holding of *Meachum* expressly excludes situations where a right was created by state law. The inmates' interest in this case is the right to be considered for parole, a right created by Nebraska law.

In *Wolff v. McDonnell, supra,* 418 U. S. at 558, the Court held that a person's liberty interests may be protected by the Fourteenth Amendment even when the liberty itself is a statutory creation of the state. The Court found that where the state had created a statutory right for a prisoner to have his sentence shortened for good conduct, and also specified that it was to be forfeited only upon serious misbehavior, the prisoner's interest was

within the liberty protected by the Fourteenth Amendment. Therefore, we must examine the Nebraska statutes governing parole release determinations to ascertain if they create a liberty interest.

Under Nebraska law, every committed offender is eligible for parole upon completion of his minimum term less reductions granted for good conduct. *See* Neb. Rev. Stat. §§ 83-1,105, 83-1,110. The Board of Parole has the duty to determine the time of release on parole of committed offenders eligible for such release and to fix the conditions of parole. Neb. Rev. Stat. § 83-192. The Board is further authorized to issue subpoenas, compel the attendance of witnesses, and the production of documents, and to administer oaths and take testimony. Neb. Rev. Stat. § 83-195.

Every committed offender is entitled to a hearing within 60 days before he is eligible for parole and when parole is not granted the Board is required to provide written notification of the reasons for denial. Neb. Rev. Stat. § 83-1,111. Section 83-1,111 further provides that if parole is denied the committed offender shall receive at least once a year a hearing at which his application is reconsidered. Neb. Rev. Stat. § 83-1,115 lists the items which are to be considered by the Board in making its determination of whether to release a prisoner on

parole. Finally, the Board is directed by Neb. Rev. Stat. § 83-1,114[3] to release an eligible prisoner on parole unless

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3 Neb. Rev. Stat. § 83-1,114 provides in full:

Board of Parole; deferment of parole; grounds. (1) Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:

(a) There is a substantial risk that he will not conform to the conditions of parole;

(b) His release would depreciate the seriousness of his crime or promote disrespect for law;

(c) His release would have a substantially adverse effect on institutional discipline; or

(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

(2) In making its determination regarding a committed offender's release on parole, the Board of Parole shall take into account each of the following factors:

(a) The offender's personality, including his maturity, stability, sense of responsibility and any apparent development in his personality which may promote or hinder his conformity to law;

(b) The adequacy of the offender's parole plan;

(c) The offender's ability and readiness to assume obligations and undertake responsibilities;

(d) The offender's intelligence and training;

(e) The offender's family status and whether he has relatives who display an interest in him or whether he has other close and constructive associations in the community;

(f) The offender's employment history, his occupational skills, and the stability of his past employment;

(g) The type of residence, neighborhood or community in which the offender plans to live;

(Continued on next page)

it finds that release should be deferred due to one of the reasons specified in the statute. Section 83-1,114 also lists the factors to be considered by the Board in making this determination.

An examination of Nebraska law reveals that the inmates have a right to be considered for parole, and this right is protected by procedural safeguards created by statute. In *Wolff*, where the state created the statutory right of shortened sentences for good behavior, the Supreme Court held such good behavior credits were to be withdrawn only when certain constitutional safeguards were adhered to. It follows that since Nebraska has made parole an integral part of its penological system and pro-

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(Continued from previous page)

(h) The offender's past use of narcotics, or past habitual and excessive use of alcohol;

(i) The offender's mental or physical makeup including any disability or handicap which may affect his conformity to law;

(j) The offender's prior criminal record, including the nature and circumstances, recency and frequency of previous offenses;

(k) The offender's attitude toward law and authority;

(l) The offender's conduct in the facility, including particularly whether he has taken advantage of the opportunities for self-improvement, whether he has been punished for misconduct within six months prior to his hearing or reconsideration for parole release, whether any reductions of term have been forfeited, and whether such reductions have been restored at the time of hearing or reconsideration;

(m) The offender's behavior and attitude during any previous experience of probation or parole and the recency of such experience; and

(n) Any other factors the board determines to be relevant.

vided that those eligible for parole are to be released on parole unless one of the reasons for denial specified in the statute is found to be present, the authority to deny parole must not be exercised arbitrarily. Neb. Rev. Stat. § 83-1,114 provides the inmates with a justifiable expectation rooted in state law that they will be conditionally released if they meet the statutory standards. Consequently, the Fourteenth Amendment due process clause is implicated. *See Wolff v. McDonnell, supra,* 418 U. S. at 557. *Compare Meachum v. Fano, supra,* 427 U. S. at 228; *Montanye v. Haymes, supra,* 427 U. S. at 242.

We agree with the reasoning of the original panel opinion in *Franklin v. Shields*, 569 F. 2d 784, 789-90 (4th Cir. 1977), *rev'd en banc*, 569 F. 2d 800 (4th Cir. 1978) (reversed upon the grounds that "the only explicit constitutional requisite is that the Board furnish to the prisoner a statement of its reasons for denial of parole"), where it was stated that:

> Since the [state] statutes contemplate that a prisoner who has satisfied all the requirements for parole will be conditionally released, the Board's investigation and review are crucial. A prisoner has much at stake in properly conducted parole proceedings, for they may result in his conditional freedom. If the proceedings are flawed—even unintentionally and in good faith, through reliance on incomplete or incorrect information—they may add years to a prisoner's confinement. Consequently, the accuracy and the sufficiency of the information the Board obtains in its investigation, which the statutes require, can have a decisive effect on parole. Also, whether the Board's review is full and fair, as contemplated by the statutes, may be a determinative factor in the grant or denial of parole. Therefore, we hold that the statutes governing the manner in which a prisoner

shall be considered for parole confer on the prisoner an interest in liberty. [Footnote omitted.]

In summary, we find that a prisoner in Nebraska has a statutory right to fair parole consideration. Because this right involves the prisoner's liberty interest, the inmate's right to consideration for parole is an aspect of liberty to which the protection of the due process clause extends. Therefore, the minimum requirement of procedural due process appropriate for the circumstances must be observed.

Having concluded that the due process clause is applicable to parole release proceedings, the question remains how much process is due. In this inquiry we are guided by the Supreme Court's observations in *Morrissey v. Brewer, supra.*

> It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U. S. 886, 895 (1961).

Morrissey v. Brewer, supra, 408 U. S. at 481. This balancing test was further refined in *Mathews v. Eldridge*, 424 U. S. 319, 334-35 (1976). The Court stated that:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an

> erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

The inmates' interest is the avoidance of arbitrary denial of parole when all of the requirements for release are satisfied. This is indeed a grievous loss. Although the severity of the loss is not a factor in determining whether governmental action implicates the Fourteenth Amendment, it is a factor when considering the extent to which procedural safeguards are required. *Meachum v. Fano, supra,* 427 U. S. at 224; *Goss v. Lopez*, 419 U. S. 565, 575-76 (1975); *Board of Regents v. Roth*, 408 U. S. 564 (1972); *United States ex rel. Johnson v. Chairman, N. Y. State Bd. of Parole, supra,* 500 F. 2d at 928.

On the other hand the Board has a substantial interest in releasing a prisoner on parole at the appropriate time. Society suffers both when the prisoner is released before he is fully rehabilitated and when he is kept in prison beyond the time when all purposes of incarceration have been served. Thus, the Board has an interest in seeing that parole is neither granted nor denied on the basis of inaccurate information or an erroneous evaluation. The Board has additional interests. It must be concerned that the procedures adopted do not interfere with the security of the institution or undermine discipline of the prisoners. It must also be concerned about the increased administrative burdens and costs occasioned by the procedural safeguards.

The task facing this court is to ascertain the minimal requirements of fundamental fairness by balancing the interests of the inmates in their statutorily granted expectation of meaningful consideration for parole and the interests of the state and society in the orderly administration of the parole system.

We agree with the district court that a parole decision is not a part of a criminal prosecution and the full panoply of rights due a defendant in such proceedings does not apply. *See, e.g., Franklin v. Shields*, 569 F. 2d 784, 800 (4th Cir. 1978) (en banc); *Haymes v. Regan*, 525 F. 2d 540 (2d Cir. 1975). *See also Wolff v. McDonnell, supra*, 418 U. S. at 556; *Morrissey v. Brewer, supra*, 408 U. S. at 482 n. 8. However, as to the precise procedural safeguards required by the due process clause, we agree completely with neither of the parties nor the district court. We find that the procedures currently employed by the Board are in certain respects constitutionally deficient but the procedures required by *Wolff v. McDonnell, supra*, need not be followed in all respects in parole decisions in state prisons. With the interests of the inmates and state in mind, we will now consider each of the procedural protections required by the district court.[4]

In its decision of October 21, 1977, the district court ordered that "[e]very inmate eligible for parole under Nebraska law must be afforded a formal parole hearing." At a minimum, once it is determined that an interest is

4 We note that the procedural protections required by this opinion are applicable only to inmates who are eligible for parole. We do not discourage Nebraska from conducting annual record reviews for all prisoners, see Neb. Rev. Stat. § 83-192(9), but this case only concerns those prisoners that are eligible for parole.

protected by the due process clause, a hearing for the person affected is required. *See Wolff v. McDonnell, supra,* 418 U. S. at 557-58; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). The inmates contend that the district court required that all inmates eligible for parole be given a formal parole hearing annually. Although the district court's opinion is arguably ambiguous on this point, we understand it to only require a formal parole hearing upon an inmate's first becoming eligible for parole. In any event, we hold that to comply with the due process clause the Board has to provide a formal parole hearing only when the inmate first becomes eligible for parole. Subsequent formal parole hearings need be held only in the discretion of the Board. We, of course, do not discourage the Board from offering more frequent formal parole hearings.

The second minimum requirement imposed by the district court concerns the notice to be given to the inmates. It provides that:

> At least seventy-two hours prior to the scheduled time of the parole hearing each inmate under consideration must receive written notice of the date and hour for which his hearing is scheduled by the board, which notice shall also include a concise listing of the factors which may be considered in evaluating an inmate for discretionary parole.

This standard actually contains two separate requirements. Initially, we have no hesitation in deciding that the due process clause entitles the inmates to receive reasonable written notice of the date and hour for the hearing. *Mullane v. Central Hanover Bank & Trust Co., supra,* 339 U. S. at 313. Under normal circumstances we

believe that a minimum advance notice of 72 hours, as mandated by the district court, allows the prisoner a fair opportunity to prepare for his appearance before the Board. Thus, the current practice followed by the Board of posting notice of the hearing at the institution on the day of the hearing is constitutionally infirm.

We also agree with the district court that the notice of the hearing must be accompanied by a listing of the criteria governing the Board's parole decisions. It is only fair to apprise the inmates of the standards to which they must conform if they are to be released on parole. Moreover, the Board offers no justification for not providing this information to the inmates. *See Franklin v. Shields*, *supra*, 569 F. 2d at 791-93; *Childs v. United States Board of Parole*, 371 F. Supp. 1246, 1247-48 (D. D. C.), *aff'd*, 511 F. 2d 1270 (D. C. Cir. 1974) (no appeal taken on this point); *Cooley v. Sigler*, 381 F. Supp. 441, 444 (D. Minn. 1974). *Contra, Haymes v. Regan*, 525 F. 2d 540 (2d Cir. 1975). Neb. Rev. Stat. § 83-1,114[5] lists the four reasons for which parole may be denied to an eligible prisoner. This section also provides 14 factors to be considered by the Board in making its decision of whether parole should be granted. We find that the statutory criteria are sufficiently specific to enable the inmate to prepare his presentation to the Board. *See Franklin v. Shields*, *supra*, 569 F. 2d at 791-92. We reiterate that a list of the factors considered by the Board must accompany the notice of a hearing given to the prisoner, or preferably by posting the statutory criteria and guidelines in the institutions in a place or places where the inmates will have access to them.

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5 See note 3, *supra*.

The district court also found that to comply with the due process clause "[e]ach inmate for whom a parole hearing is scheduled must be allowed to appear in person before the Board to present evidence in support of his application subject to prison security considerations." In its memorandum opinion the district court held, in reliance on *Wolff v. McDonnell*, *supra*, that this standard included the right to call witnesses subject to prison security considerations and the need to keep the hearing within limits. We affirm only in part. Subject to prison security considerations an inmate must be allowed to appear in person before the Board and to present documentary evidence in support of his application for parole. *Wolff v. McDonnell*, *supra*; *Mullane v. Central Hanover Bank & Trust Co.*, *supra*. This means that in many cases it will be desirable for the Board to give the applicant sufficient notice to secure documentary evidence directed to the Board's function of predicting whether parole will be successful.

Under Nebraska law a prisoner has a right to be considered for parole on the basis of certain statutory specifications. To make this right effective a prisoner must be given the opportunity to personally appear before the Board to explain and amplify the information on which the Board will base its decision. The administrative inconvenience and cost of a personal hearing is not sufficient to deprive the prisoner of this right. Moreover, a personal hearing is also beneficial to the Board and society insofar as the reliability of parole decision-making is enhanced by personal hearings. However, in the absence of exceptional circumstances the prisoner does not have a constitutional right to call witnesses in his behalf

in a formal parole hearing. Nevertheless, the Board in its discretion may permit the prisoner to call witnesses. In fact the record shows that currently the Board does allow a prisoner afforded a formal parole hearing to have witnesses. It follows from our holding that a prisoner does not have a constitutional right to confront and cross-examine adverse witnesses. *See Wolff v. McDonnell, supra*, 418 U. S. at 566-69.

The order of the district court decreed that "[a] record of the proceedings at the parole hearing must be maintained." It appears from the district court's reliance on *Wolff v. McDonnell, supra*, 418 U. S. at 565, in its memorandum opinion that this standard requires that a written record of the proceedings be maintained. Currently a record of the hearings is maintained by the Board in the form of tape recordings. We find that this method is constitutionally adequate provided that the recordings are of sufficient quality to enable the record to be reduced to writing.

The final requirement ordered by the district court is that "[w]ithin a reasonable time following the parole hearing, each inmate to whom parole is denied must be given a full and fair explanation, in writing, of the evidence relied upon and the reasons for denial of parole." We affirm. Every circuit which has held that the due process clause is applicable to parole release determinations has found that the parole board must inform the prisoner in writing of the reasons for denial of his application for parole. *See Franklin v. Shields, supra*; *United States ex rel. Richerson v. Wolff, supra*; *Childs v. United States Board of Parole, supra*; *United States ex*

rel. Johnson v. Chairman, N. Y. State Bd. of Parole, supra. See also Wolff v. McDonnell, supra, 418 U. S. at 564-65.

We agree with the reasoning of the Second Circuit that for a statement of reasons to satisfy minimal due process requirements "detailed findings of fact are not required, provided the Board's decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision * * * and the essential facts upon which the Board's inferences are based * * *." *United States ex rel. Johnson v. Chairman, N. Y. State Bd. of Parole, supra*, 500 F. 2d at 934. *See United States ex rel. Richerson v. Wolff, supra; Cooley v. Sigler, supra*, 381 F. Supp. at 443; *Candirini v. Attorney General*, 369 F. Supp. 1132, 1137 n. 8 (E. D. N. Y. 1974). *Cf. Franklin v. Shields, supra*, 569 F. 2d at 797-98 n. 59, 801. The present practice of the Board is deficient in that an inmate is not informed as to the essential facts relied on by the Board in reaching its decision.

Providing a prisoner with the reasons for denial and the essential facts relied on will serve at least four purposes. Firstly, it will facilitate judicial review in those situations where it is allowed. Secondly, it will promote thought by the Board members and will compel them to cover the relevant points and eschew irrelevances. Thirdly, it will promote the goal of rehabilitation by relieving the inmates' frustration by instructing them how they might be improving their prison behavior or taking steps with respect to some other factor (e.g., prospective employment or housing), better their chances for release. In some situations a prisoner is not considered fit for

parole because of a factor such as a long history of recidivism which the prisoner will not be able to remedy even if the Board states its reasons in writing. Nevertheless, a statement of reasons is important in those situations because it will show that the Board has not acted arbitrarily. Finally, by requiring the Board to state its reasons for denial a body of rules, principles and precedent which will promote consistency by the Board will be established. *United States ex rel. Johnson v. Chairman, N. Y. State Bd. of Parole, supra*, 500 F. 2d at 929, 931-33; *Cooley v. Sigler, supra*, 381 F. Supp. at 443. *See also Childs v. United States Board of Parole, supra*, 511 F. 2d at 1281-84; *Mower v. Britton*, 504 F. 2d 396, 398-99 (10th Cir. 1974); *King v. United States*, 492 F. 2d 1337, 1340-42 and n. 11 (7th Cir. 1974).

In summary, considering the Nebraska statutes governing parole and after weighing the interests of both the state and the prisoners, we conclude that as a minimum the due process clause of the Fourteenth Amendment requires the following: (1) Every inmate is to receive a formal parole hearing upon first becoming eligible for parole. Subsequent hearings are to be allowed in the discretion of the Board. (2) Each inmate is to receive a written notice of the date and hour of the hearing reasonably in advance. This notice shall contain a list of the factors which may be considered by the Board in making its determination. (3) Subject to security considerations, every inmate is allowed to appear in person before the Board and present documentary evidence in support of his application. In the absence of unusual circumstances an inmate does not have a constitutional right to call witnesses in his behalf. (4) A record of the proceedings

which is capable of being reduced to writing must be maintained. (5) Within a reasonable time following the hearing, each inmate to whom parole was denied must be given a full and fair explanation, in writing, of the essential facts relied upon and the reasons for denial of parole.

The district court by its order of January 4, 1978, allowed an award of attorney fees of $3,000, plus expenses of $212.77, to be included as part of the taxation of costs against the Board under the provisions of 42 U. S. C. § 1988. We follow the ruling of this court in *Finney v. Hutto*, 548 F. 2d 740, 742 (8th Cir.), *cert. granted*, 98 S. Ct. 295 (1977) (No. 76-1660), that the Eleventh Amendment does not prohibit an award of attorney fees under section 1988 against a state agency although it is not a named party to the lawsuit. The district court did not abuse its discretion in awarding fees to the inmates in this case. *See Wharton v. Knefel*, 562 F. 2d 550 (8th Cir. 1977). Accordingly, we affirm the award of attorney fees against the members of the Board in their official capacities.

The decision of the district court is affirmed in part, and reversed in part. The case is remanded to the district court which in turn should remand to the Board of Parole for the purpose of drawing up regulations implementing the guidelines set out in this opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX,

Plaintiffs,

vs.

JOHN B. GREENHOLTZ,
Individually and as Chairman,

NEBRASKA BOARD OF PAROLE, et al.,

Defendants.

Civ. 72-L-335

MEMORANDUM OPINION

Filed October 21, 1977

This suit raises an important question of first impression in this district: whether the due process clause of the Fourteenth Amendment of the United States Constitution extends to parole release determinations, and if so, whether the safeguards currently available under applicable Nebraska law are constitutionally adequate.

Plaintiffs, inmates at the Nebraska Penal and Correctional Complex, Lincoln, Nebraska, bring this class action under 42 U. S. C. § 1983[1] alleging that their consti-

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1 42 U. S. C. § 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

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tutional right to due process is being violated in consideration of their eligibility for parole and work release. The named parties defendant are the members of the State of Nebraska Board of Parole (hereafter referred to collectively as the Board).[2] Plaintiffs argue that the procedures of the defendants violate due process in the following particulars:

1) Failing to inform the inmates of the criteria which they must meet to obtain a parole or work release;

2) Failing to inform the inmates in advance of the date and time of their hearings before the Board of Parole;

3) Failing to permit inmates to present evidence and call witnesses in their own behalf;

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> Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2 This action was originally filed as a class action alleging unlawful denial of parole or work release because members of the plaintiff class had exercised their right of access to the courts, denial of parole or work release because of racially discriminatory reasons and violations of due process in the process of determinations on parole and work release. The court dismissed the due process claims and the matter proceeded to judgment on the other claims of the plaintiff class. On July 14, 1976, this court on its own motion vacated the order dismissing the due process claims, appointed counsel to represent the plaintiff class and began processing of the claim as a separate lawsuit. The matter has now been tried to the court and this memorandum constitutes the findings of fact and conclusions of law mandated by Fed. R. Civ. P. 52(a).

4) Failing to confront the inmates with evidence presented opposing their release on parole or work release;

5) Failing to give the inmates the right to cross-examine witnesses appearing before the Board of Parole in opposition to the inmates' release on parole or work release;

6) Failing to maintain a complete and permanent record of all proceedings held in considering release of inmates on parole or work release;

7) Failing to permit full representation of inmates by legal counsel in the proceedings had by the Board of Parole and to provide such counsel upon a showing of indigent status;

8) Failing to provide inmates denied parole or work release with specific written reasons why such parole or work release was denied; and

9) Failing to inform inmates denied parole or work release of the evidence relied upon in reaching the decision.

Plaintiffs request injunctive relief requiring the Board to correct the above-alleged deficiencies and also request damages.

At the outset the court points out that under Nebraska law,[3] the Board has no authority to grant work release

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3 Neb. Rev. Stat. § 83-184 (Reissue 1976) provides in pertinent part:

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status to any inmate. Although the Board may make a recommendation in this regard, the ultimate decision rests solely with the Director of Correctional Services. "The director may refuse to release a prisoner for work under the statute notwithstanding a favorable recommendation by the Board of Parole." *Housand v. Sigler,* 186 Neb. 414, 416, 183 N. W. 2d 493, 494 (1971). As noted above, the only named defendants herein are the members of the Board. Plaintiffs have failed or elected not to join as a party to this action the state officer (Director of Correctional Services) charged with the responsibility and authority to grant or deny work release. To enter or enforce a judgment against a person not before the court would clearly violate due process of law. *See, e. g., Hanson v. Denckla,* 357 U. S. 235 (1958); *Pennoyer v. Neff,* 95 U. S. 714 (1878). Accordingly, this portion of plaintiffs' claim will be dismissed for failure to join the Director as a defendant without whose presence the injunctive relief and damages sought cannot be obtained.

(Continued from previous page)

(1) When the conduct, behavior, mental attitude and conditions indicate that a person committed to the department and the general society of the state will be benefited, and there is reason to believe that the best interests of the people of the state and the person committed to the department will be served thereby, in that order, and upon the recommendation of the Board of Parole in the case of each committed offender, the Director of Correctional Services may authorize such person, under prescribed conditions to:

* * *

(b) Work at paid employment or participate in a training program in the community on a voluntary basis * * *.

The primary issue raised herein is whether any constitutionally mandated procedural safeguards apply to procedures resulting in determination regarding an inmate's release on parole. We hold that certain procedural safeguards are constitutionally required as spelled out hereinafter.

Initially we note that a conflict over this issue presently exists among the various Courts of Appeal. *See Childs v. United States Board of Parole,* 511 F. 2d 1270 (D. C. Cir. 1974) (due process applies to the extent that reasons must be given for denial of parole); *United States ex rel. Johnson v. Chairman, New York State Board of Parole,* 500 F. 2d 925 (2d Cir.) (due process applies to the extent that reasons must be given for denial of parole), *vacated as moot, sub nom Regan v. Johnson,* 419 U. S. 1015 (1974); *Bradford v. Weinstein,* 519 F. 2d 728 (4th Cir. 1974) (due process applies although the extent thereof undecided), *vacated as moot,* 423 U. S. 147 (1975); *United States ex rel. Richerson v. Wolff,* 525 F. 2d 797 (7th Cir. 1975) (due process applies to the extent that a written statement of reasons must be given for denial of parole), *cert. denied,* 425 U. S. 914 (1976); *Scarpa v. United States Board of Parole,* 477 F. 2d 278 (5th Cir.) (*en banc*) (due process does not apply), *vacated and remanded to consider mootness,* 414 U. S. 809 (1973), *dismissed as moot,* 501 F. 2d 992; *Brown v. Lundgren,* 528 F. 2d 1050 (5th Cir. 1976) (due process does not apply); *Scott v. Kentucky Board of Parole,* No. 74-1899 (6th Cir. Jan. 15, 1975) (unpublished order holding that the requirements of due process are not applicable to parole release hearings), *vacated and remanded to consider mootness,* 429 U. S. 60 (1976) (on remand — F. 2d —, June 7, 1977).[4]

The Fourteenth Amendment prohibits any state from depriving a person of life, liberty or property without due process of law.

> Application of this prohibition requires the familiar two stage analysis: we must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of "life, liberty or property;" if protected interests are implicated, we must then decide what procedures constitute "due process of law." (Citations omitted.)
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> *Ingraham v. Wright,* — U. S. —, 45 U. S. L. W. 4364, 4369 (No. 75-6527, April 19, 1977).

Following that analysis here, the initial inquiry is whether the denial of discretionary parole deprives or implicates an interest of plaintiffs within the meaning of the due process clause.

"[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Board of Regents v. Roth,* 408 U. S. 564, 570-71 (1972). *See also*

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4 *See also King v. United States,* 492 F. 2d 1337 (7th Cir. 1974), which held that the United States Board of Parole is obligated under the Administrative Procedure Act, 5 U. S. C. § 555(e) to give a statement of grounds for denial of parole. The court, however, further noted:

> (A) substantial argument can be made that some modicum of due process attend the denial of the expectation of conditional freedom on parole inasmuch as its determination after having been granted inflicts a "grievous loss" of a "valuable liberty."
>
> *Id.* at 1343.

Ingraham v. Wright, supra, — U. S. at —, 45 U. S. L. W. at 4370; *Meachum v. Fano,* 427 U. S. 215, 223-24 (1976).

The Supreme Court has addressed the nature of an inmate's interest encompassed within the due process clause in a trilogy of recent decisions: *Morrissey v. Brewer,* 408 U. S. 471 (1972); *Gagnon v. Scarpelli,* 411 U. S. 778 (1973); and *Wolff v. McDonnell,* 418 U. S. 539 (1974).

In *Morrissey,* the due process clause was held applicable to proceedings resulting in revocation of parole. The Court discussed the substantial function of parole in the correctional process.

> During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. Note, Parole Revocation in the Federal System, 56 Geo. L. J. 705 (1968). Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison. The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.
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> 408 U. S. at 477. (Footnote omitted.)

More importantly, however, the Court examined the parolee's interest in conditional liberty.

> We turn to an examination of the nature of the interest of the parolee in his continued liberty. The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked. 408 U. S. at 481-82 (Footnotes omitted.)

The Court concluded:

> We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege". By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.
>
> 408 U. S. at 482.

Thus, the Supreme Court explicitly rejected the characterization of the government benefit as a "right" or a "privilege".[5]

The Supreme Court next decided *Gagnon v. Scarpelli, supra,* 411 U. S. 778. Finding no "difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation * * *", 411 U. S. at 782, the Court held the standards of due process prescribed in Morrissey also applied to parole revocation proceedings.

Thereafter, in *Wolff v. McDonnell, supra,* 418 U. S. 539, the Supreme Court extended application of the due process clause to prison disciplinary proceedings which might result in the forfeiture of good-time credits. The Court emphasized that prisoners are not stripped of their constitutional rights by virtue of their imprisonment.

> There is no iron curtain drawn between the Constitution and the prisons of this country. * * * They (prisoners) may not be deprived of life, liberty, or property without due process of law. *Haines v. Kerner,* 404 U. S. 519 (1972); *Wilwording v. Swenson,* 404 U. S. 249 (1971); *Screws v. United States,* 325 U. S. 91 (1945).
>
> 418 U. S. at 555-56.

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5 The right-privilege distinction has also been rejected as a basis for constitutional analysis in several other areas. *Sugarman v. Dougall,* 413 U. S. 634 (1973); *Perry v. Sindermann,* 408 U. S. 593 (1972); *Board of Regents v. Roth,* 408 U. S. 564 (1972); *Graham v. Richardson,* 403 U. S. 365 (1971); *Bell v. Burson,* 402 U. S. 535 (1971); *Goldberg v. Kelly,* 397 U. S. 254 (1970). *See also Van Alstyne, Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. R. 1439 (1968).

The Court continued:

> It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison. But here the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior. Nebraska may have the authority to create, or not, a right to a shortened prison sentence through the accumulation of credits for good behavior, and it is true that the Due Process Clause does not require a hearing "in every conceivable case of government impairment of private interest." *Cafeteria Workers v. McElroy,* 367 U. S. 886, 894 (1961). But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within the Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated. This is the thrust of recent cases in the prison disciplinary context.
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> * * *
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> We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia,* 129 U. S. 114, 123 (1889). Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.
>
> 418 U. S. at 557-558.

Following this same rationale, the Court of Appeals for the District of Columbia held in *Childs v. United*

States Board of Paroles, supra, 511 F. 2d 1270, that due process is applicable to federal parole release procedures.

> The deprivations due to revocation of the conditional liberty enjoyed by a parolee demonstrate the serious effects of denial of parole. The applicant is deprived of the valuable features of conditional liberty described by the Court. This seems to us to place the procedures by which this deprivation is accomplished by the government under a standard of due process. The Board holds the key to the lock of the prison. It possesses the power to grant or to deny conditional liberty. In the exercise of its broad discretion it makes judgments concerning the readiness of an inmate to conduct himself in a manner compatible with the well-being of the community and himself. If the Board's decision is negative, the prison is deprived of conditional liberty. The result of the Board's exercise of its discretion is that an applicant either suffers a "grievous loss" or gains a conditional liberty. His interest accordingly is substantial. We think it follows that the parole decision must be guided by minimal standards of due process of law which at the same time reflect the need of the parole system to function consistently with its purposes and responsibilities.
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> * * *
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> Just as the (Supreme) Court found in *Wolff* that the State, having created the valuable right to good time, must act according to constitutional safeguards when it withdraws the right, so here, where the federal government has made parole an integral part of the penological system, I believe it is also essential that authority to deny parole not be arbitrarily exercised. While the applicant's status is not changed by such a denial in the sense that he remains in the same custodial situation as before, the necessity of due process to support the denial is not therefore obviated, for the status remains the same because of

> a Board determination which if favorable would have changed the status to one of greater liberty.
>
> 511 F. 2d at 1278, 1280.

There is no doubt a technical distinction between the situations in *Morrissey, Gagnon and Wolff* when compared to the situation in the instant case. In *Morrissey, Gagnon* and *Wolff,* a "liberty" (i. e., parole, probation and good-time credits) already afforded the individual was subject to termination or forfeiture. Here, however, the "liberty" has not yet been granted and is only prospective. The distinction, however, is not persuasive and, in any event, seems to this Court to be a subtle distinction without a real difference. This Court is in agreement with *Bradford v. Weinstein,* 519 F. 2d 728 (4th Cir. 1974), in holding that the present enjoyment of a protectable interest is not a prerequisite of due process.

> (The) present enjoyment of a protectable interest is not a prerequisite of due process. *See Goldsmith v. Board of Tax Appeals,* 270 U. S. 117, 46 S. Ct. 215, 70 L. Ed. 494 (1926) (right of C. P. A. to practice before the Board of Tax Appeals); *Willner v. Committee on Character and Fitness,* 373 U. S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963), and *Schware v. Board of Bar Examiners,* 353 U. S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957) (admission to the bar); *Speiser v. Randall,* 357 U. S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958) (right to a tax exemption).
>
> 519 F. 2d at 732 n. 3.

Of course, the "nature of the interest at stake" in both parole release and parole revocation proceedings is the same: conditional liberty versus incarceration. *See Childs v. United States Board of Parole, supra,* 511 F. 2d at 1278. *See also Bradford v. Weinstein,* 519 F. 2d at 732;

United States ex rel. Johnson v. Chairman of New York State Board of Parole, supra, 500 F. 2d at 928.

It is the opinion of this Court that the inmate has more at stake in a parole release proceeding than in the institutional disciplinary hearing which was the situation in *Wolff.*

> (T)he prospective parolee stands to gain immediately conditional release, while being "acquitted" in a good-time forfeiture hearing means only that the inmate's tentative future release date will not be postponed.
>
> *Parole Release Decision Making and the Sentencing Process,* 84 Yale L. J. 810, 852 (1975).

The Court concludes that an inmate's right to parole is a valid aspect of "liberty" under contemporary standards of justice and that the denial of that "liberty" constitutes a grievous loss.[6] It follows that the critical parole decision must be guided by certain minimum requirements of procedural due process.

As in *Morrissey, supra,* 408 U. S. at 481, "the question remains what process is due."

> "'(D)ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to

6 *Compare Meachum v. Fano,* 427 U. S. 215 (1976), wherein the court held that a state inmate was not entitled to a hearing when he was transferred to a prison with less favorable conditions, absent a state law or practice conditioning such transfer on proof of a serious misconduct or the occurrence of some other event. The court, citing *Wolff v. McDonnell, supra,* reaffirmed that a liberty interest may have its roots in state law and that due process requires minimum procedures to insure that the state created right is not arbitrarily abrogated, 427 U. S. at 226. In the instant case the right to consideration for parole is recognized in Neb. Rev. Stat. §§ 83-1,107 through 83-1,112 (Reissue 1976).

> time, place and circumstances." *Cafeteria Workers v. McElroy,* 367 U. S. 886, 895 (1961). "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer,* 408 U. S. 471, 481 (1972). Accordingly, resolution of the issue * * * requires analysis of the governmental and private interests that are affected. *Arnett v. Kennedy,* 416 U. S. at 167-168 (Powell, J., concurring in part); *Goldberg v. Kelly,* 397 U. S. at 263-266; *Cafeteria Workers v. McElroy, supra,* at 895. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See, e. g., Goldberg v. Kelly, supra,* at 263-271.
>
> *Matthews v. Eldridge,* 424 U. S. 319, 334-35 (1976).

Accordingly, the interests of the individual and the state must be carefully balanced to arrive at the requisite procedural protections. The inmate's interest in the Board's decision to grant or deny his parole is, of course, enormous. Simply put, the decision determines "whether (he) will be free or in prison, a matter of obvious great moment to him." *Wolff v. McDonnell, supra,* 418 U. S. at 560.[7] On the other hand it is equally clear that the Board has a very substantial interest in deciding whether and

7 In *Wolff,* however, the court noted that the deprivation of good-time credits did not involve an immediate change in the conditions of the inmate's liberty. 418 U. S. at 561.

when release on parole is appropriate. Yet, the Board has no interest in denying parole without certain minimum procedural safeguards to insure an informed evaluation and an accurate decision on the subject. An equally important governmental interest should be the fair and equal treatment of individuals so as to "enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Morrissey v. Brewer, supra,* 408 U. S. at 484.

This court rejects plaintiffs' argument that the full panoply of rights mandated in an adversary criminal proceeding should be afforded an inmate in a parole release proceeding. "(T)he full trappings of adversary trial-type hearings * * * would in all likelihood so burden and delay the entire parole release process as to disadvantage the very interests of the inmates as well as the public interests." *Beckworth v. New Jersey State Board of Parole,* 62 N. J. 348, 301 A. 2d 728 (1973).[8]

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8 The plaintiffs alternatively argue that the requisite procedural protection should be the same as recognized in parole revocation proceedings under *Morrissey*. These would include:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation; (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.
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> 408 U. S. at 489.

(Continued on next page)

In attempting to strike a balance between the competing interests involved, the court finds *Wolff v. McDonnell, supra,* 418 U. S. 539, most analagous to the instant case. Using the standards set out therein as a model, the Court adopts the following minimum requirements of procedural due process as applicable to the instant case:

1) Every inmate eligible for parole under Nebraska law must be afforded a formal parole hearing.

2) At least seventy-two hours prior to the scheduled time of the parole hearing, each inmate under consideration must receive written notice of the date and hour for which his hearing is scheduled by the Board. Accompanying the notice of hearing shall be a concise listing of the factors which the Board might in appropriate cases consider in evaluating any eligible inmate for discretionary parole. The notice required here will insure the eligible inmate a fair opportunity to prepare for his appearance and presentation before the Board, if he desires to do so.

3) Each inmate for whom a parole hearing is scheduled must be allowed to appear in person before the

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Within the present prison context, however, these requirements carry the potential for disrupting the efficient administration of the parole process and for interfering with institutional safety and correctional goals. *See Baxter v. Palmigiano,* 425 U. S. 308 (1976). In *Wolff,* the court specifically noted the special tension and dangers inherent in confrontational procedures within a prison. 418 U. S. at 561-63. The process rights must afford a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." 418 U. S. at 556.

Board to present evidence in support of his application, subject to prison security considerations. The scope of this right, and its rationale is well stated in *Wolff,* commencing at page 566.

> Ordinarily, the right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution. We should not be too ready to exercise oversight and put aside the judgment of prison administrators. It may be that an individual threatened with serious sanctions would normally be entitled to present witnesses and relevant documentary evidence; but here we must balance the inmate's interest in avoiding loss of good time against the needs of the prison, and some amount of flexibility and accommodation is required. Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence. Although we do not prescribe it, it would be useful for the Committee to state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases. Any less flexible rule appears untenable as a constitutional matter, at least on the record made in this case. The operation of a correctional institution is at best an extraordinary difficult undertaking. Many prison officials, on the spot and with the responsibility for the safety of inmates and staff, are reluctant to extend the unqualified right to call witnesses; and in our view, they must have the necessary discretion without being subject to unduly crippling constitutional impedi-

> ments. There is this much play in the joints of the Due Process Clause, and we stop short of imposing a more demanding rule with respect to witnesses and documents.
>
> Confrontation and cross-examination present greater hazards to institutional interests. If confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials, there would be considerable potential for havoc inside the prison walls. Proceedings would inevitably be longer and tend to unmanageability. These procedures are essential in criminal trials where the accused, if found guilty, may be subjected to the most serious deprivations, *Pointer v. Texas,* 380 U. S. 400 (1965), or where a person may lose his job in society, *Greene v. McElroy,* 360 U. S. 474, 496-497 (1959). But they are not rights universally applicable to all hearings. See *Arnett v. Kennedy,* 416 U. S. 134 (1974). Rules of procedure may be shaped by consideration of the risks of error, *In re Winship,* 397 U. S. 358, 368 (1970) (Harlan, J. concurring); *Arnett v. Kennedy, supra,* p. 171 (White, J., concurring in part and dissenting in part), and should also be shaped by the consequences which will follow their adoption. Although some States do seem to allow cross-examination in disciplinary hearings, we are not apprised of the conditions under which the procedure may be curtailed; and it does not appear that confrontation and cross-examination are generally required in this context. We think that the Constitution should not be read to impose the procedure at the present time and that adequate bases for decision in prison disciplinary cases can be arrived at without cross-examination.
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> * * *
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> The insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals. There would

also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held. At this stage of the development of these procedures we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings.

Where an illiterate inmate is involved, however, or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff. 418 U. S. at 566-68, 570.

(4) A record of the proceedings at the parole hearing must be maintained. As the court noted in *Wolff* at page 565:

> Written records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding. Further, * * * the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others. It may be that there will be occasions when personal or institutional safety is so implicated that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission. Otherwise, we perceive no conceivable rehabilitative objective or prospect of prison disruption that can flow from the requirement of these statements.

418 U. S. at 565. (Footnote omitted.)

(5) Within a reasonable time following the parole hearing, each inmate to whom parole is denied must be given a full and fair explanation, in writing, of the evidence relied upon and the reasons for denial of parole. This requirement was specifically approved in *Wolff,* 418 U. S. at 564. By stating its reasons for denying parole, the Board will promote several important functions:

> First, stating reasons for the denial of parole might help to rehabilitate the prisoner through education and guidance through self-improvement. Second, the reasons might help relieve the frustration resulting from a lack of knowledge of how one is being measured for release. Third, a policy of openness and honesty would be promoted, thereby exposing arbitrariness within the decision-making process, and allowing for the development of a body of acceptable decision-making formula.
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> Comment 6 St. Mary's Law Journal, 478, 487 (1974).

See also United States ex rel. Johnson v. Chairman of New York Board of Parole, supra, 500 F. 2d at 931-933; *Childs v. United States Board of Parole, supra,* 511 F. 2d at 1282-83.

> A requirement that the Board state its reasons in each case for denial of parole would also serve purposes other than facilitating judicial review, which are peculiarly appropriate for parole release determinations. A reasons requirement "promotes thought by the decider," and compels him "to cover the relevant points" and "eschew irrelevancies." See Frankel, Criminal Sentences 40-41 (1973).

* * *

Besides safeguarding against purely arbitrary denials of parole, a reasons requirement can serve the important function of promoting rehabilitation by relieving inmates' frustrations and letting them know how they might, by improving their prison behavior or taking steps with respect to some other factor in doubt (e. g., prospective employment or housing), better their chances for release. 500 F. 2d at 931-32.

In *King,* decided under the "reasons" requirement of the Administrative Procedure Act, the court referred with approval to the recommendations of the Administrative Conference of the United States (25 Ad. L. Rev. 459, 484-85 (Fall, 1973)). The court quoted a report used by the Conference in preparing its recommendations:

"Giving reasons for denying parole is desirable for both rehabilitational and legal reasons. A prisoner may feel less resentful of a negative decision if he knows the reasons for it, and in planning his activities in the institution he ought to understand clearly what will help him to obtain an early parole. When the nature of his crime is such that early parole is not likely in any event, he should be protected from unrealistic hopes that can only lead to disappointment and bitterness. All this is the job of a prison counselor in any case, but the Parole Board can make that job much easier by formally stating its reasons." 492 F. 2d at 1340 n. 11. The court expressed awareness of the pitfalls enumerated by the Conference to be avoided in the giving of reasons, *Id.* at 1341 n. 12, but did not consider that they overcame the need for a statement of reasons, nor had the Conference itself done so.

Childs v. United States Board of Parole, 511 F. 2d 1270, 1282 (1974).

It is this court's judgment that the above procedures represent a reasonable and proper accommodation between

the interests of prospective parolees and the interests of the state and which will not unduly burden the Board's task.

We turn to the question of whether the safeguards currently afforded under Nebraska law are adequate. The Nebraska statutory scheme provides for a two-step hearing process in discretionary parole proceedings.[9] The first step is a "case and record review hearing." These hearings are conducted at least annually by the Board for all inmates, regardless of their eligibility for parole. *See* Neb. Rev. Stat. § 83-192(9) (Reissue 1976).[10]

In practice, the review hearing consists of a five-to-ten minute appearance of each inmate before the Board.

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9 Discretionary parole, as defined by the Board, is a release on parole by virtue of an exercise of discretion on the part of the Board, such release occurring prior to expiration of the maximum term of imprisonment imposed by the sentencing court. An inmate becomes eligible for release on discretionary parole upon completion of his minimum term of confinement less any deduction for good behavior. In the case of an inmate serving consecutive sentences, he becomes eligible for parole upon completion of the total of the minimum term, less any reduction for good behavior. See Neb. Rev. Stat. § 83-1,110 (Reissue 1976).

10 Neb. Rev. Stat. § 83-192(9) (Reissue 1976) reads:

The Board of Parole shall:

* * *

(9) Review the record of every committed offender, whether or not eligible for parole, not less than once each year. Such review shall include the circumstances of the offender's offense, the presentence investigation report, his previous social history and criminal record, his conduct, employment, and attitude during commitment, and the reports of such physical and mental examinations as have been made. The board shall meet with such offender and counsel him concerning his progress and his prospects for future parole.

The inmates do not have the right to present documentary evidence or to call witnesses in their own behalf. Following the review hearing, an inmate is either deferred for later consideration, or if eligible for a discretionary parole[11] and if approved by the Board, he is scheduled for a parole hearing.

In the case of a deferral, the inmate receives a Form PB-1 informing the inmate of the reasons for denial and making recommendations for correcting deficiencies. The form further specifies the month, but not the date or time, of the next review hearing.

If, on the other hand, after the review hearing, the Board schedules the inmate for a formal parole hearing, the second stage of the hearing process, the inmate receives a Form PB-2, notifying him that he is eligible for parole and identifying the month when a hearing will be held. Notification of the exact date and time of the hearing is posted at the Penal Complex on the date of the hearing. Subsequently, inmates denied parole are notified by letter as required by Section 83-1,111(2). The letter usually, but not always, contains the reasons for denial. In no case is the inmate advised of the evidence relied on by the Board in reaching its decision.[12]

It would serve no purpose to delineate further the practices of the Board with regard to the scheduling and conducting of the hearings for inmates eligible for pa-

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11 *See* Note 9, *supra*.

12 Neb. Rev. Stat. § 83-1,111(1) (Reissue 1976) requires that a complete record of the proceedings at a parole hearing be maintained, but does not specify that the Board identify the evidence upon which it relies in reaching a decision.

role.[13] Suffice it to say that in respect to the procedures which this court holds are required as a minimum, the present practice of the Board falls short in some instances, and is broader than what this Court requires in other instances.

Having determined that not all constitutionally mandated safeguards are currently provided by defendants, the remaining issue is what forms of relief are appropriate. Plaintiffs are entitled to injunctive relief and to that end a judgment will be entered this day requiring the defendants to implement and put into effect the procedures required by this determination within sixty days from this date. This is not to suggest that the Board in its discretion may not continue practices beyond those mandated herein but only to require that at a minimum those provisions be implemented.

Plaintiffs' request for monetary damages is denied. Plaintiffs have not adequately proved that they have sustained actual damages as a result of the activities of the defendants. The evidence indicates that the defendants have acted in good faith to discharge their responsibilities as fairly and equitably as possible. In view of the novelty of the issues presented in this jurisdiction and the split in other circuits on the question involved here, the evidence does not warrant a finding which justifies a mone-

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13 In view of the determination regarding the minimum safeguards necessary for parole hearings, we do not pass on the validity of certain practices mandated by Nebraska statutes or policies such as furnishing information or records to an inmate and his right to confer with others in preparation of his presentation before the Board (Neb. Rev. Stat. § 83-1,112).

tary award in this case. *See Pierson v. Ray,* 386 U. S. 547 (1967); *Scheuer v. Rhodes,* 416 U. S. 232 (1974); *Wood v. Strickland,* 420 U. S. 308 (1975).

Under the provisions of 42 U. S. C. § 1988 the court finds that plaintiffs should be allowed a reasonable attorney fee as a part of the costs to be borne by the defendants. The court will leave to the parties the task of determining an appropriate fee for the appointed counsel for plaintiffs with the admonition that should the parties be unable to agree on an amount, they may apply to this court for determination of the fee. The taxing of costs, including attorney fees, whether agreed upon or not, shall not operate to preclude any party from immediately exercising its appeal rights should it desire to do so.

Consistent with this memorandum, a separate order will be entered this day.

BY THE COURT:

/s/ Albert G. Schatz
Judge, United States District Court

APPENDIX C

83-192. The Board of Parole shall:

(1) Determine the time of release on parole of committed offenders eligible for such release;

(2) Fix the conditions of parole, revoke parole, issue or authorize the issuance of warrants for the arrest of parole violators, and impose other sanctions short of revocation for violation of conditions of parole;

(3) Determine the time of discharge from parole;

(4) Visit and inspect any facility, state or local, for the detention of persons charged with or convicted of an offense, and for the safe-keeping of such other persons as may be remanded thereto in accordance with law;

(5) Serve in an advisory capacity to the Director of Correctional Services in administering parole services within any facility and in the community;

(6) Interpret the parole program to the public with a view toward developing a broad base of public support;

(7) Conduct research for the purpose of evaluating and improving the effectiveness of the parole system;

(8) Recommend parole legislation to the Governor;

(9) Review the record of every committed offender, whether or not eligible for parole, not less than once each year. Such review shall include the circumstances of the offender's offense, the presentence investigation report, his previous social history and criminal record,

his conduct, employment, and attitude during commitment, and the reports of such physical and mental examinations as have been made. The board shall meet with such offender and counsel him concerning his progress and his prospects for future parole;

(10) Make rules and regulations for its own administration and operation;

(11) Appoint and remove all employees of the board and delegate appropriate powers and duties to them;

(12) Transmit annually to the Governor a report of its work for the preceding calendar year, which report shall be transmitted by the Governor to the Legislature; and

(13) Exercise all powers and perform all duties necessary and proper in carrying out its responsibilities under the provisions of this act.

83-1,111. (1) Every committed offender shall have a hearing before a majority of the members of the Board of Parole within sixty days before the expiration of his minimum term less any reductions. Every committed offender shall be interviewed within sixty days prior to his final parole hearing by a member of the Board of Parole. The hearing shall be conducted in an informal manner, but a complete record of the proceedings shall be made and preserved.

(2) The board shall render its decision regarding the committed offender's release on parole within a reasonable time after the hearing. The decision shall be by majority vote of the board. The decision shall be based on the entire record before the board, which shall

include the opinion of the member who presided at the hearing. If the board shall deny parole, written notification listing the reasons for such denial and the recommendations for correcting deficiencies which cause the denial shall be given to the committed offender within thirty days following the hearing.

(3) If the board fixes the release date, such date shall be not more than six months from the date of the committed offender's parole hearing, or from the date of last reconsideration of his case, unless there are special reasons for fixing a later release date.

(4) If the board defers the case for later reconsideration, the committed offender shall be afforded a parole hearing at least once a year until a release date is fixed. The board may order a reconsideration or a rehearing of the case at any time.

(5) The release of a committed offender on parole shall not be upon the application of the offender, but by the initiative of the Board of Parole. No application for release on parole made by a committed offender or on his behalf shall be entertained by the board. Nothing herein shall prohibit the Director of Correctional Services from recommending to the board that it consider an individual offender for release on parole.

83-1,112. (1) Each committed offender eligible for parole shall, in advance of his parole hearing, have a parole plan in accordance with the rules of the Board of Parole. Whenever the board determines that it will facilitate the parole hearing, it may furnish the offender with any information and records to be considered by it at the hearing.

(2) An offender shall be permitted to advise with any person whose assistance he desires, including his own legal counsel, in preparing for a hearing before the Board of Parole.

83-1,114. (1) Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:

(a) There is a substantial risk that he will not conform to the conditions of parole;

(b) His release would depreciate the seriousness of his crime or promote disrespect for law;

(c) His release would have a substantially adverse effect on institutional discipline; or

(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

(2) In making its determination regarding a committed offender's release on parole, the Board of Parole shall take into account each of the following factors:

(a) The offender's personality, including his maturity, stability, sense of responsibility and any apparent development in his personality which may promote or hinder his conformity to law;

(b) The adequacy of the offender's parole plan;

(c) The offender's ability and readiness to assume obligations and undertake responsibilities;

(d) The offender's intelligence and training;

(e) The offender's family status and whether he has relatives who display an interest in him or whether he has other close and constructive associations in the community;

(f) The offender's employment history, his occupational skills, and the stability of his past employment.

(g) The type of residence, neighborhood or community in which the offender plans to live;

(h) The offender's past use of narcotics, or past habitual and excessive use of alcohol;

(i) The offender's mental or physical makeup, including any disability or handicap which may affect his conformity to law;

(j) The offender's prior criminal record, including the nature and circumstances, recency and frequency of previous offenses;

(k) The offender's attitude toward law and authority;

(l) The offender's conduct in the facility, including particularly whether he has taken advantage of the opportunities for self-improvement, whether he has been punished for misconduct within six months prior to his hearing or reconsideration for parole release, whether any reductions of term have been forfeited, and whether such reductions have been restored at the time of hearing or reconsideration;

(m) The offender's behavior and attitude during any previous experience of probation or parole and the recency of such experience; and

(n) Any other factors the board determines to be relevant.

83-1,115. Before making a determination regarding a committed offender's release on parole, the Board of Parole shall consider the following:

(1) A report prepared by the institutional caseworkers relating to his personality, social history and adjustment to authority, and including any recommendations which the staff of the facility may make;

(2) All official reports of his prior criminal record, including reports and records of earlier probation and parole experiences;

(3) The presentence investigation report;

(4) Recommendations regarding his parole made at the time of sentencing by the sentencing judge;

(5) The reports of any physical, mental and psychiatric examinations of the offender;

(6) Any relevant information which may be submitted by the offender, his attorney, the victim of his crime, or by other persons; and

(7) Such other relevant information concerning the offender as may be reasonably available.